Supreme Court, U.S.
FILED

(1)

No. 041643

JUN 2 2005
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In The
Supreme Court of the United States

PAUL D. LAPIDES,

Petitioner,

v.

BOARD OF REGENTS OF THE
UNIVERSITY SYSTEM OF GEORGIA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether long-standing res judicata principles should be applied differently in a Title VII employment discrimination case so that a partial judgment by a federal court on some (but not all) federal claims in a prior lawsuit that was thereafter remanded to state court qualifies as a final judgment on the merits so as to bar a subsequent federal complaint filed after a right-to-sue letter was procured?

LIST OF PARTIES BELOW

In addition to the parties reflected in the caption, also defendants in the earlier proceedings below were Edwin A. Rugg (personally and in his capacity as Vice-President of Academic Affairs, Kennesaw State University (KSU)), Timothy Mescon (individually and in his capacity as Dean of Coles College of Business at KSU), and Teresa J. Covin (personally and in her capacity as Chair of the Department of Management & Entrepreneurship at KSU). Mr. Mescon was later dismissed without prejudice from the suit.

TABLE OF CONTENTS

Page

Question Presented for Review ..... (i)
List of Parties Below ..... (ii)
Opinions Below 1
Statement of Jurisdiction 1
Statutes Involved 2
Statement 2

Reasons for Granting the Petition 10

LOWER COURTS ARE IN SUBSTANTIAL DISARRAY AS TO THE PROPER CONTOURS OF CLAIM PRECLUSION IN TITLE VII CASES INVOLVING STATE PROCEEDINGS AND SUBSEQUENTLY ISSUED RIGHT-TO-SUE LETTERS 10

A. Tension Exists In Lower Court Decisions As To Whether There Should Be An Equitable Exception To Res Judicata In Title VII Cases 12

B. The Decision Below Is Manifestly In Conflict With The Holdings Of Other Circuits That A Final Judgment On the Merits Is Required, In Order for Res Judicata To Apply 18

Conclusion 24

TABLE OF AUTHORITIES

CASES

Allen v. McCurry, 449 U.S. 90 (1980) 11, 21
Boateng v. InterAmerican Univ., Inc.,
210 F.3d 56 (1st Cir. 2000) 21
Brown v. Felsen, 442 U.S. 127 (1979) 15
Brzostowski v. Laidlaw Waste Sys., Inc.,
49 F.3d 337 (7th Cir. 1995) 13
Churchill v. Star Enters.,
183 F.3d 184, 193 (3d Cir. 1999) 13, 21
Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990) .. 22
Covington v. First Nat'l Bank, 198 U.S. 100 (1905) 22
Cromwell v. County of Sac, 94 U.S. 351 (1876) 11, 21
Devlin v. Transp. Communications Int'l Union,
175 F.3d 121 (2d Cir. 1999) 13
Federated Department Stores, Inc. v. Moitie,
452 U.S. 394 (1981) 11, 16, 21
Havercombe v. Dep't of Educ. of Puerto Rico,
250 F.3d 1 (1st Cir. 2001) 13
Herrmann v. Cencom Cable Assocs., Inc.,
999 F.2d 223, 225 (7th Cir. 1993) 13, 14
Heyliger v. State Univ. & Cmty. Coll. Sys. of Tenn.,
126 F.3d 849 (6th Cir. 1997) 13
Hill v. Potter, 352 F.3d 1132 (7th Cir. 2003) 21
Jang v. United Technologies Corp.,
206 F.3d 1147 (11th Cir. 2000) 8, 13, 19
Kremer v. Chemical Construction Corp.,
456 U.S. 461 (1982) 22
Lapides v. Board of Regents of the Univ. System of Georgia,
535 U.S. 613 (2002) ..... *passim*

Montana v. United States, 440 U.S. 147 (1979) 12
Miller v. United States Postal Serv.,
825 F.2d 62, 64 (5th Cir. 1987) 13
Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.,
309 U.S. 4 (1940) 22
Owens v. Kaiser Found. Health Plan, Inc.,
244 F.3d 708, 714-15 (9th Cir. 2001) 13, 14, 21
Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 11, 16
Ragsdale v. Rubbermaid, Inc.,
193 F.3d 1235 (11th Cir. 1999) 12
Rivers v. Barbertown Board of Education,
143 F.3d 1029 (6th Cir. 1998) 13, 19, 20, 21
Sanders v. Venture Stores, Inc., 56 F.3d 771 (7th Cir. 1995) 14
Union & Planters' Bank v. Memphis, 189 U.S. 71 (1903) . 22
Ute Indian Tribe v. Utah, 114 F.3d 1513 (10th Cir. 1997) . 16
Woods v. Dunlop Tire Corp.,
972 F.2d 36 (2d Cir. 1992) 13, 16, 21
Wright v. Georgia R. & B. Co., 216 U.S. 420 (1910) 22

STATUTES AND RULES

28 U.S.C. § 1254(1) 1
28 U.S.C. § 1441 3
28 U.S.C. § 1446 3

Civil Rights Act,
42 U.S.C. § 1983 3
42 U.S.C. § 2000e-2 2
42 U.S.C. § 2000e-5 11

Americans with Disabilities Act,
42 U.S.C. § 12117(a) 10

Federal Rules of Civil Procedure
Fed. R. Civ. P. 12(b)(1) 3
Fed. R. Civ. P. 12(b)(6) 3
Fed. R. Civ. P. 41(a) 22

STATE MATERIALS

Ga. Code § 9-11-41(a) 6, 22

PETITION FOR WRIT OF CERTIORARI

Petitioner, Paul D. Lapides, respectfully prays that a writ of certiorari issue to review the December 27, 2004, opinion and judgment of the U.S. Courts of Appeals for the Eleventh Circuit in the above-captioned proceeding.

OPINIONS BELOW

The opinion and judgment of the U.S. Court of Appeals for the Eleventh Circuit, *Lapides v. Board of Regents of the University System of Georgia*, No. 04-1261-H (11th Cir. Dec. 27, 2004), is unreported but is reprinted at App. 1a. The U.S. District Court's Order of March 24, 2004, is unreported but is reprinted at App. 7a. The District Court's Order approved and adopted a Report and Recommendation of a U.S. Magistrate as the judgment of the Court. The Report and Recommendation of February 13, 2004, is unreported but is reprinted at App. 12a.

STATEMENT OF JURISDICTION

Petitioner seeks review from the opinion and judgment of the U.S. Court of Appeals for the Eleventh Circuit of December 27, 2004. The Eleventh Circuit denied Lapides' petitions for rehearing and for rehearing en banc on March 8, 2005. See App. 5a. The Supreme Court has jurisdiction to review cases from the Courts of Appeals under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This Petition raises questions about the proper scope of the res judicata doctrine as a ground for rejecting Title VII employment discrimination claims brought under 42 U.S.C. § 2000e-2 (2005).

STATEMENT

1. This is the second time this matter is before this Court. See *Lapides v. Board of Regents of the Univ. System of Georgia*, 535 U.S. 613 (2002). Petitioner, Paul D. Lapides, is a professor at Kennesaw State University (KSU), part of the State University System of Georgia under its Board of Regents ("Regents"). Aggrieved because of various personnel actions taken against him by KSU administrators, Lapides brought suit in Superior Court of Cobb County, State of Georgia, on March 9, 2000, naming as defendants the Regents and three KSU administrators in both their personal and official capacities. See, *supra*, at (ii). Lapides' complaint sounded in common law tort, but also included an allegation that defendants had violated his constitutional due process rights. Chief among Lapides' complaints was that KSU officials encouraged a former student who had already graduated to file a false charge of sexual harassment against him, publicized the charges in violation of state and federal guidelines, and then retaliated against Lapides when he complained he was being treated unfairly because of his religion. Like five other professors, Lapides had complained about KSU's treatment, including, for example, conducting an unprecedented meeting among five administrators and another professor's student/lover to encourage her to file a criminal complaint against Lapides, using the criminal

complaint to justify denying Lapides' internal appeal, and then covering up their involvement in and the existence of the criminal complaint.

In the original, state court complaint, see App. 143a, filed because of the impending expiration of a statute of limitations on one of Lapides' state law claims, Lapides did not allege any causes of action under Title VII of the Civil Rights Act because he had not received a right-to-sue letter.

On April 13, 2000, attorneys for the State of Georgia filed two Answers in Cobb County Superior Court, one on behalf of the Regents and the other for the individual defendants. Both Answers asserted as an affirmative defense sovereign immunity and Georgia's Eleventh Amendment immunity. On the same day, Georgia's lawyers filed a Notice of Removal in the U.S. District Court for the Northern District of Georgia. See App. 2a. The Notice asserted a right of removal under 28 U.S.C. §§ 1441 & 1446, insofar as Lapides' complaint ostensibly sought recovery under 42 U.S.C. § 1983. With its Removal Notice filed in federal court, Georgia then sought, on the same day, to dismiss the entirety of Lapides' complaint under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). See App. 2a; 535 U.S. at 616.

2. a. Lapides resisted the removal of the case to federal court and sought remand. The District Court denied the motion to remand. See App. 2a. The District Court then denied Georgia's Motion to Dismiss on Eleventh Amendment grounds, holding that Georgia had waived its immunity by removing the case to federal court and then seeking a dispositive ruling on the merits. See App. 2a, 53a; 535 U.S. at 616-17. Although the District Court denied Georgia's Motion to Dismiss on Eleventh Amendment grounds, it did grant dismissal on Lapides' section 1983 claims against the two named defendants in their personal

capacities. The remainder of Georgia's grounds for dismissal were rejected.

b. Georgia took an interlocutory appeal from the District Court's ruling that it had waived its Eleventh Amendment immunity, and the Court of Appeals reversed. App. 2a, 53a; 535 U.S. at 617. The Eleventh Circuit ruled that Georgia had not waived any Eleventh Amendment immunities by voluntarily removing the case to federal court. The Court of Appeals reversed and remanded to the District Court, which was "instructed to hear only those non-barred claims over which it has jurisdiction and remand the others to state court. If no such non-barred federal questions exist, the whole case is to be remanded to state court." App. 53a; 535 U.S. at 617.

c. Lapides sought certiorari in this Court, which was granted. See 534 U.S. 991 (2001). A unanimous Court, Breyer, J., writing, then reversed, holding that when a States "removes a lawsuit from state court to federal court [it] waives [its Eleventh Amendment] immunity." 535 U.S. at 616. This Court limited its holding, however, making the following procedural observations:

> It has become clear that we must limit our answer to the context of state-law claims, in respect to which the State has explicitly waived immunity from state-court proceedings. That is because Lapides' only federal claim against the State arises under 42 U.S.C. § 1983, that claim seeks only monetary damages, and we have held that a State is not a "person" against whom a § 1983 claim for money damages might be asserted. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 66 (1989). Compare Tr. of Oral Arg. 57-58 (asserting that complaint also sought

> declaratory judgment on the federal claim), with complaint, App. 9-19 (failing, implicitly or explicitly, to seek any such relief). Hence this case does not present a valid federal claim against the State. Nor need we address the scope of waiver by removal in a situation where the State's underlying sovereign immunity from suit has not been waived or abrogated in state court.
>
> It has also become clear that, in the absence of any viable federal claim, the Federal District Court might well remand Lapides' state-law tort claims against the State to state court. 28 U.S.C. § 1367(c)(3). Nonetheless, Lapides' state-law tort claims against the State remain pending in Federal District Court, § 1367(a), and the law commits the remand question, ordinarily a matter of discretion, to the Federal District Court for decision in the first instance. *Moor v. County of Alameda*, 411 U.S. 693, 712 (1973). Hence, the question presented is not moot. We possess the legal power here to answer that question as limited to the state-law context just described. And, in light of differences of view among the lower courts, we shall do so.

535 U.S. at 617-18 (citations omitted).

In closing its opinion, the Court concluded "that the State's action joining the removing of this case to federal court waived its Eleventh Amendment immunity – though, as we have said, the District Court may well find that this case, now raising only state-law issues, should nonetheless be remanded to the state courts for determination. 28 U.S.C. § 1367(c)(3)." 535 U.S. at 1646.

3. a. On remand from this Court to the Eleventh Circuit, see 46 Fed. Appx. 617, 2002 WL 1798862 (11th Cir. July 15, 2002), and thence to the District Court, the District Court, in its discretion, remanded the remaining state law claims to state court. In order to proceed first with his pending Title VII claim (discussed below), Lapides subsequently dismissed without prejudice the pending state law complaint, pursuant to Ga. Code § 9-11-41(a); App. 153a. See App. 2a, 8a, 53a.

b. Lapides in 2001 filed the present verified complaint against the Regents in federal court. See App. 87a. The federal complaint exclusively raised employment discrimination and retaliation claims in violation of Title VII, see 42 U.S.C. § 2000e et seq. (2005). Lapides' original complaint, filed in state court in 2000, had not alleged a Title VII claim, although the original complaint noted that, concurrent with its filing, Lapides would file "a complaint with the Equal Employment Opportunity Commission [EEOC] based upon claims of disparate and discriminatory treatment against him on the basis of religion, gender and for retaliation. Upon the receipt of the appropriate authorization, it is anticipated that these claims will be added to the within and foregoing complaint as an amendment." App. 151a. Lapides only received a right-to-sue letter from the Georgia Commission on Equal Opportunity [GCEO] on June 26, 2001, App. 54a, subsequent to the removal of the original complaint to federal court and the appeals on the Eleventh Amendment issue. Indeed, the GCEO's right-to-sue letter was issued just prior to the filing of the Petition for Writ of Certiorari in the original proceeding before this Court.

b. After remand from this Court, and the District Court's remand of the pending state law claims to state court and Lapides' subsequent dismissal without prejudice of the state law claims, the Regents sought to dismiss the federal Title VII complaint, arguing that the underlying facts pled were identical

to the original, state court complaint, and that, according to this Court's ruling, there were no viable federal claims remaining, and such constituted a sufficient final judgment on the merits to qualify for dismissal on res judicata grounds. In a Report and Recommendation issued by a federal magistrate, after an agreed referral by the District Court, this res judicata defense was sustained. See App. 62a.

The magistrate recommended rejecting Lapides' arguments that (1) he could not have possibly brought his Title VII claims in the original, state court proceeding, because of the lack of a right-to-sue letter, and that the Regents' procedural maneuverings had prevented a subsequent amendment of the federal complaint; and (2) that there had been no final judgment on the merits because Lapides had voluntarily dismissed without prejudice the state law claims when they had been finally remanded back to state court, after this Court's 2002 ruling. As to the first issue, the magistrate, in making her recommendation, relied on precedent suggesting that parties could not split their causes of action, even where there had been a delay in issuing a right-to-sue letter. See App. 60a (collecting cases from the Second, Sixth and Seventh Circuits). The magistrate noted that while Lapides could not have amended his original, state court complaint, while it was pending on appeal in the Eleventh Circuit and this Court on the Eleventh Amendment waiver issue, he could have sought a right-to-sue letter from the GCEO at an earlier time. See App. 60a. As to the second issue, the magistrate noted that this Court had dismissed Lapides' federal claims against the Regents, and that such "was a final judgment on the merits," App. 61a-62a. The magistrate did not discuss the fact that the District Court previously had remanded Lapides' state law claims to state court, and thus, no final judgment had been issued and the lawsuit remained pending when the District Court confirmed there were no federal claims

pending against the Regents. The magistrate also did not discuss or consider the legal effect of Lapides' subsequent voluntary dismissal of the state complaint, even though under Georgia law, a voluntary dismissal without prejudice does not constitute a final judgment on the merits for res judicata purposes. See App. 62a.[1]

c. The District Court adopted the Report and Recommendation of the Magistrate, discussing only the res judicata ruling, and held that Lapides' Title VII claims were barred by res judicata. See App. 11a. The District Court expressly applied the Eleventh Circuit's decision in *Jang v. United Technologies Corp.*, 206 F.3d 1147 (11th Cir. 2000), holding that a plaintiff could not delay filing an action under the Americans with Disabilities Act (ADA), even without an EEOC right-to-sue letter, without suffering res judicata consequences. The *Jang* decision, in turn, followed the reasoning of the Second, Sixth, and Seventh Circuits on this aspect of res judicata jurisprudence. See App. 9a-10a (quoting *Jang*, 206 F.3d at 1149 (collecting cases)). In any event, the District Court granted summary judgment to the Regents on Lapides' Title VII claims, ruling that they were barred by res judicata.

d. The Eleventh Circuit affirmed. See App. 4a. In the operative part of the decision, the court of appeals held:

> [W]e conclude that the disposition of this case is controlled by our decision in *Jang*. There, we

[1] The Magistrate Report and Recommendation proceeded to address the substance of Lapides' religious discrimination and retaliation claims under Title VII, although without addressing the totality of circumstances that Lapides alleged, and recommended rejecting these claims on the merits on grounds that are not material to this Petition. See App. 64a-85a.

> held that "plaintiffs may not split causes of action to bring, for example, state law claims in one suit and then file a second suit with federal causes of action after receiving a 'right-to-sue' latter." *Jang*, 206 F.3d at 1149. Lapides claims that he did not plead his Title VII claim with the previous suit because he had not yet received a right-to-sue letter, but *Jang* instructs that he cannot split his cause of action in this manner. Lapides also argues that the previous claim was not finally adjudicated on the merits, but we disagree. As noted above, the Supreme Court (and this Court on remand) determined that Lapides did not present a valid federal claim against the Board.

App. 3a-4a.

e. Lapides sought a Petition for Rehearing, or in the alternative, a Petition for Rehearing En Banc, which was denied on March 8, 2005. See App. 5a. This timely Petition for Writ of Certiorari follows.

REASONS FOR GRANTING THE PETITION

LOWER COURTS ARE IN SUBSTANTIAL DISARRAY AS TO THE PROPER CONTOURS OF CLAIM PRECLUSION IN TITLE VII CASES INVOLVING STATE PROCEEDINGS AND SUBSEQUENTLY ISSUED RIGHT-TO-SUE LETTERS

The nub of this return case to the Supreme Court is the nature and extent of the doctrine of res judicata, or claim preclusion, in Title VII and allied[2] employment discrimination and retaliation cases, as well as civil cases in general. While this case's first appearance in this Court implicated the issue of whether States waive their Eleventh Amendment immunity when they remove cases from state to federal court, see *Lapides v. Board of Regents of the Univ. System of Georgia*, 535 U.S. 613 (2002) ("*Lapides I*"), this Petition concerns larger questions as to the interplay of state and federal law in making res judicata determinations involving complaints that have both federal and state claims. This Court's ruling in *Lapides I* is significant as to the characterization of some of Lapides' state court claims, and the lower courts in subsequent proceedings grasped onto this Court's language in *Lapides I* to render decisions which vastly expand the scope of the judge-made law of res judicata and holding that Lapides' subsequent, federal court Title VII complaint was barred.

[2] In addition to Title VII of the Civil Rights Act, other federal statutory schemes involve the administrative participation of the Equal Economic Opportunity Commission (EEOC) in issuing right-to-sue letters, most notably the Americans with Disabilities Act (ADA). See 42 U.S.C. § 12117(a).

This Petition raises concerns as to two crucial qualifications to the normally-applied rules of claim preclusion in Title VII cases. The first involves the timing of the procurement of right-to-sue letters from the EEOC or state authorities (such as GCEO), which are a statutory predicate for filing any employment discrimination or retaliation case under that statutory scheme. See 42 U.S.C. § 2000e-5(f)(1); *Patterson v. McLean Credit Union*, 491 U.S. 164, 181(1989). There is some tension in the decisions of the courts of appeals as to whether, in all cases, a successive complaint containing allegations of Title VII violations (filed after a right-to-sue letter is issued) is barred, under the doctrine of res judicata, by a final disposition to an earlier complaint which did not raise (and could not have raised) a Title VII count. Some courts of appeals, in contrast to the decision below, appear to have recognized some form of equitable exception to claim preclusion rules, especially where (as here) the defendant employer, through its own litigation conduct, hampered the plaintiff's ability to join his Title VII complaint with the pending complaint.

The second issue raised by this Petition is much broader in significance, applying to the full scope of res judicata doctrine. That is whether it is really essential to a claim preclusion bar that there have been a final judgment on the merits in an earlier proceeding sufficient to trigger res judicata. This has been taken as an article of faith in this Court's jurisprudence for many years. See *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1876); *Allen v. McCurry*, 449 U.S. 90, 94 (1980); *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398-99 (1981). Lapides does not challenge the decision below because of some ostensible confusion regarding the standards of res judicata; the Eleventh Circuit clearly acknowledged that a "final judgment on the merits" was a requisite for res judicata to apply. See App. 3a (citing *Ragsdale*

v. Rubbermaid, Inc., 193 F.3d 1235, 1238 (11th Cir. 1999)). Nor does Lapides question the underlying logic of res judicata as a doctrine, the purpose of which is that the "full and fair opportunity to litigate protects [a party's] adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana v. United States*, 440 U.S. 147, 153-54 (1979). Instead, the issue raised by this Petition is whether the requirement of a final judgment must be strictly construed in order to effectuate the goals of federalism and judicial cooperation, especially where state law would – in the normal course – control the claim preclusion effects of state court judgments. In other words, does a partial judgment on the merits by a federal court, where state law claims in the same lawsuit remain pending in state court, satisfy the final judgment prong of res judicata?

The court of appeals ruling below vastly expands the contours of res judicata doctrine, not only in the situational context of the Title VII and other employment claims, but also in its wider dimensions. It is especially incumbent on this Court, which has the last word on such judge-made rules as claim and issue preclusion, to insure the regularity and predictability of these doctrines. This is particularly so where the interplay of res judicata and coordinate federal remedial statutes can produce very harsh consequences for litigants.

A. Tension Exists In Lower Court Decisions As To Whether There Should Be An Equitable Exception To Res Judicata In Title VII Cases.

1. Lapides acknowledges that most courts of appeals are aligned as to the broad proposition that Title VII plaintiffs may

not split causes of action to bring state law claims in one suit and then file a second suit with federal causes of action after receiving a right-to-sue letter. See *Jang v. United Technologies Corp.*, 206 F.3d 1147, 1149 (11th Cir. 2000) (citing *Heyliger v. State Univ. & Cmty. Coll. Sys. of Tenn.*, 126 F.3d 849, 855-56 (6th Cir. 1997); *Brzostowski v. Laidlaw Waste Sys., Inc.*, 49 F.3d 337, 339 (7th Cir. 1995); *Woods v. Dunlop Tire Corp.*, 972 F.2d 36, 41 (2d Cir. 1992); *Rivers v. Barberton Board of Education*, 143 F.3d 1029 (6th Cir. 1998)). See also *Havercombe v. Dep't of Educ. of Puerto Rico*, 250 F.3d 1, 4-8 (1st Cir. 2001); *Churchill v. Star Enters.*, 183 F.3d 184, 193 (3d Cir. 1999); *Miller v. United States Postal Serv.*, 825 F.2d 62, 64 (5th Cir. 1987); *Herrmann v. Cencom Cable Assocs., Inc.*, 999 F.2d 223, 225 (7th Cir. 1993); *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 714-15 (9th Cir. 2001). The logic of these decisions is that plaintiffs are free to avoid the claim preclusive effects of their litigation conduct if they merely file one complaint raising non-Title VII state or federal claims, seek a stay of proceedings while they await a right-to-sue letter from the EEOC, and then, once the letter is procured, amend their original complaint. See *Woods*, 972 F.2d at 36.

But some courts have clearly recognized that there can be equitable exceptions to the application of res judicata principles in the Title VII/employment discrimination case context. See *Jang*, 206 F.3d at 1149 n.3 ("Appellant asks the Court to find manifest injustice or equitably modify the doctrine of res judicata on these facts. Appellant suggests that the alleged failings of the EEOC and the OFCCP prevented Appellant from receiving a "right to sue" letter. We see no basis for an equitable modification on the facts of this case."); *Devlin v. Transp. Communications Int'l Union*, 175 F.3d 121, 128-30 (2d Cir. 1999) (res judicata not applied, where actions were before same district court judge, and judge knew that they were

related and thus could have considered consolidating them); but see *Owens*, 244 F.3d at 714 (rejecting application of equity to modify res judicata principles in Title VII cases).

The Seventh Circuit has clearly staked-out a position recognizing an equitable exception to res judicata in the special circumstances of Title VII cases. In *Sanders v. Venture Stores, Inc.*, 56 F.3d 771, 774 (7th Cir. 1995), that court of appeals recognized that there may be situations where a district court may properly deny a Title VII plaintiff's leave to amend a complaint because such a move was "unduly delayed" or would cause "undue prejudice" to the defendant and the courts. See id. at 774. In that case, leave to amend was sought after discovery had closed in the case, and the defendant had filed a motion for summary judgment. See id. The court left open the question of whether denying a Title VII plaintiff's leave to amend would constitute an equitable exception to application of res judicata principles for a subsequently-filed lawsuit that did plead the Title VII count.

In *Herrmann v. Cencom Cable Assocs., Inc.*, 999 F.2d at 223 (7th Cir. 1993), the court of appeals, Judge Posner writing, had an extended discussion of situations where equitable principles might come into play with the timing of Title VII filings:

> Ordinarily (as here for example) the statutes of limitations governing the plaintiff's other claims will not be so short that he risks being barred from pursuing those claims by waiting to complete the Title VII administrative process. If he does face a looming deadline for suing on his other claims he can ask the EEOC or its state counterpart to accelerate the administrative process; he will have a good case for doing so.

> Moreover, an employer who sees an opportunity for settling the case informally with the aid of the EEOC may, in order to enable the administrative process to continue, agree with the employee not to plead the statute of limitations. . . . And finally the employee can sue on his other claims, ask the court – and again he would have a very strong case for doing so – to stay the proceedings until the Title VII administrative process is complete, and then if the process does not end in a way that satisfies him amend his complaint to add a Title VII count. These possibilities make the danger that applying res judicata in Title VII suits will interfere with the legislative design remote.

Id. at 225. Judge Posner's analysis clearly contemplates situations, out of the "ordinar[y]" course, where an equitable relaxation of res judicata principles may be appropriate.

2. Lapides would observe that this Court has not been entirely consistent in its statements as to the appropriate role of equitable exceptions to the application of res judicata. In *Brown v. Felsen*, 442 U.S. 127 (1979), this Court observed:

> Because res judicata may govern grounds and defenses not previously litigated, however, it blockades unexplored paths that may lead to truth. For the sake of repose, res judicata shields the fraud and the cheat as well as the honest person. It therefore is to be invoked only after careful inquiry.

Id. at 132. In another case, this Court has counseled lower courts to adhere to traditional principles of res judicata and not to make any "ad hoc determination of the equities in a particular

case," and so appeared to reject any equitable exceptions to the application of res judicata based on "public policy" or "simple justice." *Moitie*, 452 U.S. at 401. Some lower courts have construed this language as not necessarily barring an equitable exception to res judicata, as much as suggesting that particular equities – such as avoiding an "[in]accurate judgment or to avoid the injustice that might result from a strict application of the principles of finality" – are an improper judicial motivation. See *Ute Indian Tribe v. Utah*, 114 F.3d 1513, 1523 (10th Cir. 1997).

On the other hand, courts have recognized that seeking to reconcile two, conflicting decisions, or to harmonize a judgment with a federal statutory scheme, might be a permissible ground to modify the strictures of claim preclusion. See id; see also *Patterson*, 491 U.S. at 180 (federal laws should be construed in a manner that would not "undermine the detailed and well-crafted procedures for conciliation and resolution of Title VII claims."); but see *Woods*, 972 F.2d at 39 ("Woods and amicus curiae, the EEOC, argue that res judicata should not apply to situations like the one presented here because application of the doctrine would be inconsistent with the scheme of Title VII. Although we have not previously had occasion to address this issue, and while this Court is committed to giving full effect to the Title VII administrative scheme set up by Congress, we are of the opinion that the language and policy of Title VII do not undercut the application of res judicata, and we see no reason militating against application of well-settled claim preclusion principles.").

3. Obviously, there will be situations (as occurred here), where the *defendant's* litigation conduct made it practically impossible for a Title VII plaintiff, mindful of claim preclusion consequences, to act in the way counseled by these decisions. It was the Regents, after all, that removed the original complaint

from state court to federal court and then, contemporaneously, sought dismissal on Eleventh Amendment grounds. Appeals as to the propriety of the litigation tactic (including proceedings in this Court) consumed nearly three years, during such time the district court was functus officio as to any motion by Lapides to amend his complaint to include the Title VII count (once the right-to-sue letter was issued in June 2001). Even the lower court in this case acknowledged that Lapides could not have amended his complaint given the state's litigation behavior in this case. See App. 60a.

Lapides will, by no means, seek to advocate a broad, equitable exception to claim preclusion principles in Title VII and other employment discrimination contexts. The dockets of the federal courts are already over-burdened by these filings, and it is natural that these tribunals will have recourse to such a judge-made doctrine as res judicata or claim preclusion to weed-out frivolous or successive cases. Rather, the objective here is for the Court to articulate a narrow exception based on the common-sense principle that judge-made doctrines (such as claim preclusion) should not operate at odds with express statutory schemes (such as Title VII). Where a Title VII defendant's litigation conduct makes it practically impossible for a plaintiff to avoid filing a second complaint (this one featuring a Title VII count, after a right-to-sue letter has issued), sound principles of statutory construction and judicial policy make it inadvisable to follow a strict rule of res judicata. If it were otherwise, Title VII defendants would simply engage in particular forms of litigation tactics in order prevent a subsequent amendment of a complaint, and then later (once a second complaint was filed) argue claim preclusion principles as a bar.

B. The Decision Below Is Manifestly In Conflict With The Holdings Of Other Circuits That A Final Judgment on the Merits Is Required, In Order For Res Judicata To Apply.

1. As already noted, see *supra* at 10-11, the other analytic mis-step made by the court of appeals in this case has broader significance to the wider contours of res judicata jurisprudence. The lower court appeared to appreciably relax the requirement that there be a final judgment on the merits, in order for claim preclusion to apply. Curiously, the court of appeals appeared to rely on this Court's ruling, in *Lapides I*, that "Lapides had not presented a valid federal claim against the Board [of Regents]," and construed this as a final judgment on the merits. App. 4a. In actuality, what this Court observed in *Lapides I* was that

> because Lapides' only federal claim against the State arises under 42 U.S.C. § 1983, that claim seeks only monetary damages, and we have held that a State is not a "person" against whom a § 1983 claim for money damages might be asserted. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 66 (1989). Compare Tr. of Oral Arg. 57-58 (asserting that complaint also sought declaratory judgment on the federal claim), with complaint, App. 9-19 (failing, implicitly or explicitly, to seek any such relief). Hence this case does not present a valid federal claim against the State.

535 U.S. at 617.

At most, this ruling could only constitute a partial judgment as to Lapides' claims, and certainly not a ruling on the

merits. As this Court said in *Lapides I*, "Lapides' state-law tort claims against the state remain pending in Federal District Court, and the law commits the remand question, ordinarily a matter of discretion, to the Federal District Court for decision in the first instance." 535 U.S. at 618 (citation omitted).

On remand to the district court, the district court, in its discretion, remanded the pending state law claims to state court. It is axiomatic that when the district court remanded the lawsuit to state court, there was no final judgment in the lawsuit (otherwise there would have been nothing to remand), and this Court's prior ruling that there were no viable federal claims, adopted by the court of appeals and the district court as the law of the case, constituted at best a partial judgment.

Likewise, any reliance by the court of appeals, see App. 2a (or the district court, see App. 8a), on Lapides' voluntary dismissal without prejudice of his state law claims, once the case had been remanded back to state court, could not possibly be construed as a final judgment on the merits. It is black letter law in Georgia (and in federal courts) that a voluntary dismissal without prejudice has no preclusive effect under res judicata doctrine.

2. The Eleventh Circuit's relaxation of the "final judgment on the merits" condition for the application of res judicata, can be directly traced to a line of authority that creates a conspicuous split in the circuits. In making the decision it did, the court of appeals relied on its precedent in *Jang*, and appeared to reach the issue previously avoided in that decision. See 206 F.3d at 1149 n.2 ("We decline to address whether the *Jang I* court's dismissal of Appellant's ADA claim, based on his failure to obtain a 'right to sue' letter, was 'on the merits.' See *Rivers v. Barberton Bd. of Educ.*, 143 F.3d 1029, 1032 (6th Cir.1998)."). In *Rivers*, the issue was whether a dismissal of a

Title VII claim made without benefit of a right-to-sue letter was "merely jurisdictional, or "on the merits," for purposes of claim preclusion. The Sixth Circuit noted:

> Rivers urges that a dismissal for failure to satisfy a condition precedent should not be considered an adjudication on the merits for claim preclusion purposes. She notes that at least two other circuits have adopted this position. See *Harris v. Amoco Prod. Co.*, 768 F.2d 669, 679 n. 18 (5th Cir.1985); *Pinkard v. Pullman-Standard*, 678 F.2d 1211, 1218 (5th Cir. Unit B 1982); *Stebbins v. Nationwide Mut. Ins. Co.*, 528 F.2d 934, 937 (4th Cir.1975). However, we need not decide this question today, because, as we will explain, the preclusive effects of the *Rivers I* suit would have obtained irrespective of whether the dismissal of the Title VII claim was considered to be on the merits.
>
> It is of no consequence here whether the Title VII claim was dismissed on the merits in *Rivers I* so long as some relevant portion of *Rivers I* was dismissed on the merits. It is undisputed that the *Rivers I* court dismissed with prejudice the race-discrimination claim premised on the myriad theories, including 42 U.S.C. §§ 1981 and 1983, contained in the *Rivers I* amended complaint. This was a final decision on the merits of the race-discrimination claim by a court of competent jurisdiction, not only as to those legal theories, but also as to any other legal theory under which that claim might have been litigated. See *Nevada v. United States*, 463 U.S. 110, 129-30 (1983); *Harrington v.*

> *Vandalia-Butler Bd. of Educ.*, 649 F.2d 434, 437 (6th Cir. 1981). Consequently, whether or not the dismissal of the Title VII claim was on the merits – indeed, whether or not a Title VII theory was even pleaded – element one was satisfied.

143 F.3d at 1031.

The Sixth and Eleventh Circuit's relaxation of the "final judgment on the merits" standard for Title VII cases has been contradicted by virtually every other court of appeals to consider the issue. Aside from the Fourth and Fifth Circuit decisions mentioned in *Rivers* itself, other courts of appeals have clearly articulated the rule that there must be a final, not a partial, judgment on the merits. See *Hill v. Potter*, 352 F.3d 1132, 1144 (7th Cir. 2003) ("[T]he 1997 decision disposed of the *entire* lawsuit, and was therefore a final decision" upon which res judicata could be based) (original emphasis); *Owens v. Kaiser Foundation Health Plan, Inc.*, 244 F.3d 708, 714 (9th Cir. 2001); *Boateng v. InterAmerican Univ., Inc.*, 210 F.3d 56, 63 (1st Cir. 2000); *Churchilll v. Star Enterprises*, 183 F.3d 184, 194 (3d Cir. 1999); *Woods v. Dunlop Tire Corp.*, 972 F.2d 36, 38 (2d Cir. 1992). Additionally, the Eleventh and Sixth Circuit's analysis appears to conflict with this Court's time-honored approach as to the required complete finality of judgments for res judicata purposes. See *Cromwell*, 94 U.S. at 352; *Allen*, 449 U.S. at 94; *Moitie*, 452 U.S. at 398-99.

Insofar as the court of appeals relied on this Court's characterization of Lapides' claims in his first complaint, and the fact that no section 1983 claim for monetary relief could be made out against the State, such was not a "final judgment on the merits," sufficient to trigger res judicata. To the extent that the Eleventh Circuit characterized that ruling as a partial

judgment on the merits, this either perpetuates a split in the circuits as to what is a decision "on the merits" that would implicate claim preclusion, or went far beyond the established limits of jurisprudence as to the effect of judgments that decide less than the full range of a plaintiff's claims.

3. Lest there be any doubt on this point, to the extent that the lower courts relied on Lapides' voluntary dismissal of his state law claims, upon remand to the state court, such can have no res judicata consequences. For starters, the claim preclusion effects of a state court order are properly construed under that state's law. See *Union & Planters' Bank v. Memphis*, 189 U.S. 71, 74 (1903); *Covington v. First Nat'l Bank*, 198 U.S. 100, 104 (1905); *Wright v. Georgia R. & B. Co.*, 216 U.S. 420, 428-29 (1910); *Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.*, 309 U.S. 4, 6 (1940). This Court has expressly acknowledged this principle in the Title VII litigation context. See *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 466-67 (1982).

Georgia law is unambiguous that a voluntary dismissal of a complaint by a plaintiff has no preclusive effect. See Ga. Code § 9-11-41(a)(3) ("A dismissal under this subsection is without prejudice, except that the filing of a second notice of dismissal operates as an adjudication on the merits."); App. 153a. This is also true for dismissals under the analogous provisions of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 41(a). See *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396 (1990).

4. This Petition raises very significant questions as to the proper scope of the res judicata doctrine, especially in the context of Title VII and other employment litigation. As already discussed, it is not Lapides' intent to unsettle the fundamental premises that have guided this Court's jurisprudence in this

area. Rather, the objective is for the Court – using this case as an appropriate vehicle – to clarify the role of res judicata in Title VII proceedings, as well as reaffirm the requirement that there be a complete and final adjudication on the merits before any claim preclusive effect is sought for a prior judgment. It is incumbent for this Court – as the ultimate expositor for such judge-made doctrines as claim preclusion – to provide helpful guidance to lower courts, especially in situations (as here) where there are recurring problems in managing the complex interplay between res judicata principles and the requirements of federal statutory schemes.

CONCLUSION

For the foregoing reasons, the Petition should be GRANTED.

Respectfully submitted,

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June 2005